In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-51

EUGENE JOHN IZZI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that 18 U.S.C. App. 1202 violates the due process clause; that the government failed to prove petitioner's knowledge of the statute's jurisdictional predicate; that the trial court erred by responding to a question from the jury with a supplemental instruction which, although a correct statement of the law, it had refused to give previously; and that a fine levied by a municipal court bars a subsequent federal prosecution.

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted, as a previously convicted felon, of receiving and possessing in commerce or affecting commerce a firearm, in violation of 18 U.S.C. App. 1202. He was sentenced to a term of two years' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. A; 498 F. 2d 1403).

The evidence adduced at trial revealed that on February 22, 1973, two Hammond, Indiana, police officers responded to a radio call that there was a disturbance at a nearby hotel (T. 51-53). As they approached the hotel they observed four men standing outside talking in loud tones. One of the men, who was subsequently identified as petitioner, stated that he had a .44 magnum and pulled open his trench coat revealing "the hand grips of a large gun" (T. 54-55). Two days after this incident petitioner was convicted by a municipal court of illegal possession of a firearm (T. 161; Pet. App. 2).

Petitioner was subsequently interviewed by a federal agent, to whom he explained that he had purchased the weapon on the street just prior to his arrest (T. 88). The government introduced evidence that the pistol in question had been sold the preceding year in Atlanta, Georgia, to one Billy Clanton (T. 102-105) and that petitioner had previously been convicted of a felony in South Carolina (T. 113-115).

1. Petitioner contends that 18 U.S.C. App. 1202 violates the Constitution because it "arbitrarily" punishes a felon who possesses a firearm which has traveled in interstate commerce, but does not punish a felon who possesses a firearm which has not traveled in interstate commerce. This claim is insubstantial. The source of "unequal" treatment, if any, is the Constitution itself, which limits the power of Congress to those transactions affecting interstate commerce. In any event petitioner cannot complain that Congress has dealt with only a portion of the problem of the firearm abuse. Congress may proceed in a piecemeal fashion. See, *e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471, 486-487.

2. Petitioner also contends (Pet. 14-21) that in order to satisfy the interstate commerce nexus requirement of the statute the government must show that he was aware of the weapon's interstate travel or that he possessed it during interstate travel. However, travel in commerce is only a jurisdictional predicate. It is not part of the *mens rea* of the offense. *United States* v. *Allegretti*, 340 F. 2d 243 (C.A. 7). Petitioner was charged with receiving as well as possessing, and the government's evidence that the gun had been sold in Atlanta, Georgia, was uncontradicted (T.102-105). The jurisdictional predicate was thus clearly established. Cf. *United States* v. *Bass*, 404 U.S. 336, 350.

3. Petitioner contends that the trial court erred when it responded to a note from the jury with supplemental instructions which it had refused to give with the original instructions. The instructions given were correct statements of the law, and as the court below noted "the district court cannot be said to have erred by instructing the jury as to the correct nature of the law" (Pet. App. 4). Petitioner's counsel argued to the jury that the jurisdictional predicate of the offense had not been established (T. 162-163); the court's supplemental charge accurately answered a question from the jury which was apparently provoked by that argument.[1]

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[1]Petitioner cannot claim that his final argument was based on a belief that the court had accepted his assertion as to the interstate commerce requirements, because the court previously had rejected this reasoning in denying his motion for a directed verdict (T. 142-151).

4. Petitioner's final contention is that a "City Court conviction" (Pet. 21) and fine (T. 161) for possessing the weapon bars this federal prosecution. However, this Court has held that where the same act is both a federal and a state crime the offender may be prosecuted by either or both jurisdictions. *United States* v. *Lanza*, 260 U.S. 377; *Abbate* v. *United States*, 359 U.S. 187; see also *Bartkus* v. *Illinois*, 359 U.S. 121.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[2]Petitioner apparently contends that the "same evidence" test of *Blockburger* v. *United States*, 284 U.S. 299, would prohibit the federal prosecution. However, in the federal trial the government had to show that the pistol had previously traveled in interstate commerce and that the defendant was a felon. Neither was an element of the local offense of "possession of a firearm" (Pet. 21).